Judicial Independence – A Democratic Norm or a Transitionary Necessity?*

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Abstract

In emerging democracies, judicial independence is a key indicator of institutional strength and commitment to the democratic rules of the game. In this paper, we examine whether judicial independence is just a transitionary necessity or is it truly a democratic norm. By exploring the cases of South Africa and Pakistan, we argue that if the judiciary manages to disassociate itself from the regime through judicial autonomy and institutionalization under authoritarian rule, it will become an alternative source of laws and public policy. It would become a counter weight to the regime and by that virtue consolidate its independence. But once the transition to democracy is complete, the court will not be allowed to function as a counter balance to the legislature or executive and by extension will witness its independence erode. We argue that the largely non-democratic elements of bureaucratic efficiency, public opinion, and existing British post-colonial Common Law structures serve to insulate and strengthen the court against political attacks on the judiciary as an institution in authoritarian regimes but such structures are struck down once democracy returns.

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The debate over the concept of judicial independence has spanned decades. In the political science literature, it can refer to two different concepts. The first is the autonomy or independence of judges from other individuals or institutions. This can apply to judges as individuals or judges as a collective whole (Russell 2001). As an illustration, Judge Y issued his decision independently of the majority of the Judges on the Court in case Z. The second conceptualization of the term is through judicial behavior. This type of judicial independence refers to the independence that can be perceived in judicial behavior when rendering decisions (Russell 2001). For example, judges in X country were able to render decisions that appeared independent of other political considerations. The two concepts are deeply intertwined with one another. We want individual judges/courts to be able to make decisions independently from one another while also being institutionally independent from other branches of government (Abraham 2001). For the purposes of this paper, we are interested in exploring the role of judicial independence in the latter sense i.e. as an institution that is able to adjudicate independently especially in times of governance transitions.

Specifically, this paper intends to explore how countries gain and retain judicial independence in times of governance transitions. Governance transitions refers to instances where one form of government is making way for another. For example, a democratic country is backsliding in to authoritarianism or vice versa. Theoretically, the

courts derive their legitimacy from the cover provided by existing laws and regulations. In authoritarian regimes, the judiciary is empowered sequentially to allow the regime to focus on tasks it feels are crucial for its survival (Walker, 2010). In democracies the courts have the power, by the virtue of constitutional protections granted to them.

We are interested in how the court's independence as an institution changes based on the directionality of the transition in progress. Beyond this point, the judiciary takes two divergent paths; one by which it becomes central to the cause of democracy and helps with transition to eventually go back to being a bureaucratic institution[1] and the second case where it helps with transition to democracy but continues to act with relative independence and becomes a failsafe for the democratic system (Fiss 1993). Hence, this paper argues that the trajectory taken to achieve judicial independence will determine whether the courts become an independent institution or end up being a subservient institution to the executive. This approach is an alternative narrative to the literature that states that judicial independence is a permanent feature in democracies. Our approach is interested in retention of judicial independence as much as it is interested in acquisition of it in the first place.

[1] Hoque (2010) presents in great detail how the judiciary in the case of Bangladesh decided to forfeit its independence to become a subservient bureaucratic institution once democracy was restored. This is an alternative narrative to most other cases presented in favor of judicial independence as being a key feature in democracies.

What this paper seeks to argue is that despite the claims that the literature makes about the success of democracies establishing a stable independent judiciary, it may not always be so. Instead, we propose that the regime type is not the determinant of judicial independence, but rather it is the process of institutionalization and changing public opinion that cements the rule of law and independence. We argue that *in times of governance transitions, the public has higher confidence in the judiciary if it manages to disassociate itself from the regime through judicial autonomy and institutionalization*. But *in times of democratic consolidation, judiciary ends up giving up on autonomy and faces a public backlash when it disassociates itself from the government through judicial activism and institutionalization*. Therefore, judicial independence may be critical to move towards a democracy but it erodes once democracy is achieved as in that case judiciary's attempts at being independent are construed as an attempt to provide an alternative source of law and public policy.

This paper adds to the discussion by presenting two case studies, South Africa and Pakistan. In both cases the legal structure is based on the British Common law system. We present how the judiciary in these two cases diverged based on the amount of political and institutional support it received from other fellow branches of government. In the case of South Africa, despite the constitutional and institutional protections provided by the democratic government, the executive and legislative branch began to declare war on the judiciary in an attempt to undermine it once it attempted to exercise its independence.

However, in the case of Pakistan, the judiciary maintained its distance from the authoritarian government even when it democratized by consistently providing an alternative source of laws, leaving the institution stronger than it has ever been. It is pertinent to mention here that the case of Pakistan we use is between 2006 and 2009 while the case of South Africa captures events between 2011 to 2015.

We further argue that the judiciary *has* the choice to exercise activism and gain legitimacy and independence by utilizing public interest litigation and the structures of the colonial British Common Law system to create a supportive legal eco-system whereby judges and lawyers operate as an epistemic community. Whether the courts choose to do that is more likely in authoritarian regimes as opposed to democratic regimes. We contend that the courts choose to take up public interest litigation and consolidated epistemic community networks during authoritarian regimes as a mechanism to create public policy on difficult issues that the rulers do not wish to get involved in. Essentially courts have a bigger role in public policy making when there is a lack of sources of public policy i.e. authoritarian rule.

This paper will first provide a discussion of the existing literature on Judicial Independence as a concept, and then it will discuss the various trajectories taken within the literature. The cases of South Africa and Pakistan will be presented to provide similarities and differences to those plans. The intention of this paper is to highlight the subset of judicial independence cases that are called *Judicial Autonomy* cases. These are

cases in which the judiciary is not only independent, but is also detached from the regime in charge and its day to day decision-making operations. It is through the litigation of these cases that are of public interest litigation that the court attempts to create a competing source of public policy and law in areas left vacant under an authoritarian regime. Such void disappears once democracy takes hold and democratic consolidation essentially over time fills up the void rendering the court's role in public policy making through such litigation/actions unnecessary. This eventually hurts the judicial independence of the courts that no longer have the same authority and influence. By applying this argument to South Africa and Pakistan, we call in to question the notion that judicial independence is purely a democratic norm.

Judicial Independence: What's in a Concept?

The modern debates on the concept of independence can be traced back to battles between Congress and the Judiciary[2]. These attempts had re-occurred with regularly frequency throughout history, and only served to show what a lack of judicial independence would do to a functioning separation of powers system. Without a stable judiciary, there would be little to safeguard and interpret the protections that the

[2] One such pivotal conversation that took place was between Congressman Ervin and Supreme Court Justice Tom Clark during the 1970's when Congress was attempting to pass a series of aggressive legislative actions to curb judicial corruption allegations. Congressman Ervin was the Chairman on the House Judiciary Committee, and avidly advocated for judges to be "left alone" to act as self-regulators and neutral actors who needed to place themselves above party politics. The messages passed between the two men highlighted the history of failures that the Legislative and Executive branches had undergone in attempts to change the judiciary.

Constitution provided for individuals and minorities from the tyranny of the majority or the power of dictators and tyrants. Kauffmann (1980) built upon these foundations, and showed that the independence of the judiciary also allowed it to act in an oversight function to the other two branches of government. He states that it was the ability of a judge to self-regulate and self-isolate from political pressures that made their impartiality and independence so crucial to separation of powers. Rosenburg (1992) argued that self-regulation by the courts was a strategic decision, and that the Judiciary had to constantly be aware of Congressional and Executive responses to case outcomes. He showed that self-regulation by the Courts was actually a function of the cues that they had taken from other branches when making their decisions. Under his definition, a truly independent court was one that could operate without the direct pressure of elected or un-elected officials providing any kind of regulation upon judicial behavior, if pressure existed then judges were not acting independently but rather strategically.

Since the literature remained relatively unsure, but stable in the divide on the definition of judicial independence, they decided to attempt it from a different approach. What criteria exist when judicial independence is present? How do these factors enable the judiciary to act independently from other branches (Iarycozower, Spiller, and Tommasi 2002)? In some cases scholars relied upon the idea of rights enabling and protection (North and Weingeist 1989; Howard and Carey 2004), how it strengthened democracy (North et al. 2000; Howard and Carey 2004), how it decreased human rights

violations (Powell and Stanton 2009), or how it promoted economic and political freedom (O'Brien and Ohkoshi 2001: La Porta et al. 2004). An independent judiciary would have the capabilities to do all of these things and more with a little bit of strategic planning (Gely and Spiller 1992). This requires the judiciary to carefully self-regulate their behavior to choose to be activist (Canon 1982; Galligan 1991) or to avoid cases that are adverse to the current political tone (Clark 1970; Ginsberg 2003; Vondoepp 2006) when making policy decisions.

The role of the courts was also to serve as a watchdog over the other branches possible abuses of power (Kauffman 1980). This role was established in democracies as a part of separation of powers and in authoritarian governments as de-facto task-management (Helmke 2002). In a democracy the judiciary ensures separation of powers and oversight so that the other branches of government do not overpower one another. It also acts as a democratizing agent in countries in transition. It protects against dictators and tyrants by upholding the constitution and deriving legitimacy from it. In cases where the courts are under an authoritarian regime, their role is significantly different. In these instances the courts are often part of the regime and operating under the theory of bureaucratic efficacy. In democratic regimes, the idea of self-regulation becomes more of a choice as the institution changes to become more independent, in the case of an authoritarian government, self-regulation and the use of strategy is a must for the court to create any kind of independence.

Transitioning to Independence

The literature on judicial transitions is held up by three key players within the literature, Larkin (1996), Fiss (1993) and Gloppen and Kanvongolo (2006). These three independently trace the possible processes the courts can take when developing judicial independence. Specifically, they look at transitions from authoritarian regimes to democracies.

Gloppen and Kanvongolo (2006) utilize a case study of Malawi to show that the judiciary fulfills three functional roles in a transition. They provide electoral accountability during elections, they act as neutral arbiters in political disputes, and they help to act as middle-men to release tensions between transitioning democratic and authoritarian regime forces. These roles help to smooth and ease the transition by providing a leverage point between the two opposing forces in a country. Fiss (1993), on the other hand, argues that the political insularity of the judiciary in a democratic transition is not always the best bet. He claims that this political strength in a transitioning country can lead to a dominance of the judiciary over other branches. This happens by default when the judiciary plays such a pivotal role in the transitions arbitration. In an authoritarian regime though, he claims that this insularity by the judiciary is crucial. He argues that 'regime relativity' is fundamental, and that such a distinction can make or break the judiciary in a transitioning country. His argument is similar to my own, but this paper provides an alternate through which an authoritarian regime can achieve

judicial independence. In his argument it is important to set up a politically insular institution from the onset of the regime to achieve judicial independence, but I find that this may not always be the case in authoritarian regimes and that judicial independence can still be achieved. Larkin (1996) takes on Fiss's (1993) framework and applies the framework to a case study of transitioning Chile. In his case, democracies have two goals from the judiciary in a transitioning country, to break from the past and to enforce a legal culture that fits within the established institutional culture. Larkin (1996) shows that by creating a judiciary that is a helpmate to the institutions of the standing government that independence can still be achieved.

The route the judiciary can take to independence, we argue, occurs in stages. First, the judiciary must establish its role as a bureaucratic and efficient institution. This may come under the arm of the authoritarian regime or in the stages of a burgeoning democratic transition. In this, they begin to establish their legitimacy and insularity as an institution. The courts are neutral actors and operate as part of the bureaucratic culture theoretically without having any loyalties to political actors (Iaryczower, Spiller, and Tommasi, 2002). As mentioned earlier this is possible due to the constitutional space provided to the courts or as tasking by the authoritarian.

Next, the judiciary can begin to use this expanded power and reputation to use cases to their advantage. It is during this phase that the courts tend to utilize public interest litigation to set the court up as neutral player focused on increasing the access to

justice for the common public. As Cassels (1989) points out, the courts are able to take up such litigation as it is built in to the constitution. By doing so, they begin to build up alternative sources of legitimacy that they can rely upon. Bhagwati & Dias (2012) endorse this notion by arguing that at least at the Supreme Court level, it is the judge with the highest authority that leads the effort of public interest litigation to these ends.

The literature supports the idea that this use of the media and public interest litigation can act as a springboard to gaining autonomy and independence even if the case of a dictatorship (Fiss 1993; Hoque 2010; Bhagwati &Dias 2012). Along with the structures of the surrounding legal system, the judiciary can utilize these tools to choose one of two paths remain dependent on the rest of the political system or attain autonomy and independence.

The next two sections of the paper discuss our case studies. The case of South Africa, follows a democratic transition to judicial independence that is full of difficulties. From the outset the legislative and executive branches seek to undermine the authority of the judiciary despite its wide popular support, efficient bureaucratic structure, and relative autonomy. The judiciary at the end is left in a state of stasis and fear for the repercussive actions that could be taken against them even within the seemingly successful democratic regime.

In contrast the case of Pakistan shows that through the innovation of a strong Chief Justice and the support of the strong legal community, public, and media, judicial independence is achievable even under an authoritarian regime. In case of Pakistan, the judiciary is able to maintain the role of providing an alternative source of public policy and laws throughout a dictatorship and even during early phases of democratization while in South Africa the court is forced to forgo such power as the country moves from democratization to democratic consolidation.

Judiciary in South Africa

Institutional Shifting: Repression to Democratic Structure

Judicial independence in South Africa is a function of the political and social change that has been under construction since the beginning of the twentieth century. The courts in South Africa have been at the epicenter of the country's struggles for political independence and equality. Even now the courts have to steer carefully through the wreckage that was left in the wake of the repressive oligarchy that was in power in South Africa for most of the modern era. Left with deep ties to a history full of racism, segregation, and apartheid, the courts have undergone many challenges to overcome the overwhelming odds of success and maintain a level of autonomy from the National Assembly, the National Council of Provinces (NCOP), and the office of the President.

The multi-party parliamentary democracy of South Africa was established under the Constitution of the Republic of South Africa on December 4th of 1996. The full force of the Constitution was brought into effect on February 4th of 1997 (Thompson 2001). Since the end of the Second World War, the South African regime had waged war against its own African citizens. They banned all of their major political parties, including the ANC, banned the production of African political literature, and they harassed, imprisoned, and tortured crucial political leaders (Laurence Schlemmer et al. 1996). The end of apartheid in 1994 and the ratification of the new Constitution in 1997 ended the century long dominance of white South Africans at the expense and exclusion of Africans.

Within this new Constitution of South Africa was Section VIII which primarily defined the judiciary. This section provided all of the expected structures, functions, and expectations of the judiciary. It also clearly establishes a guarantee that the independence, integrity, and impartiality of the judiciary would remain intact, and would be protected by the other branches of government. The Constitution also provides all of the typical institutional safeguards that protect individual judges from being persuaded or coerced towards a particular party in a case. They are provided tenure of service, protection of their rate of pay during and after their retirement from service to the courts, and job security and protection from the political or bureaucratic maneuvers of others.

Prior to the new Constitution and during the democratic transition, the court had adapted similar structures to those utilized during apartheid. This was executed with the

expectation that under the new Constitution the judiciary would undergo massive structural and functional reforms. The first of these reforms came with the formation of the Constitutional Court. This court was conceptualized under the Constitutional Court Complementary Act of 1995 (International Bar Association 2008). It was created solely to function as a safeguard of the new Constitution and to create reform in the lower court levels. Another reform came with the creation of the Judicial Services Commission (JSC). The JSC was an independent advisory body to the government that would provide advice concerning the appointment and removal of judges. It is made up of a mix of representatives from all the major actors in the justice system – lawyers, judges, academics, and personnel from the judicial, legislative, and executive branches (International Bar Association 2008).

Additionally, the transformation also resulted in the creation of the Department for Justice and Constitutional Development (DOJCD). The DOJCD's main purpose is to consult, advice, and create different strategies for reforming the lower courts in South Africa. They aim to increase the efficiency, improve the management of the individual municipal court branches, and refocus the goals of the court on human rights, equality, fairness, and accountability to the public (International Bar Association 2008). At the behest of the DOJCD, a bevy of legislation has been created with aims to reforming the judiciary some with better intentions than others. These bills (e.g. The Superior Courts Bill and the 14th Amendment to the Constitution Bill) have resulted in a variety of strong

responses and questions about the state of the judiciary in South Africa (International Bar Association 2009).

Legislative De-Legitimizing and the path to the African National Congress of Polokwane

The DOJCD's comprehensive approach to reforming the judiciary in South Africa was first laid out in a series of policy documents and consultations titled, Justice Vision 2000 (1997). It was first issued in 1997, and for a period of time it was the backbone of the DOJCD's plans for reform. Justice Vision 2000 sought to create "a legitimate, service-oriented, and efficient system of courts that worked to administer justice by individuals that represented every part of South Africa" (International Bar Association 2008 , 18). These reforms came with a bevy of changes to the courts, the police, the prison, and the legal profession – all as subsidiary structures to the Court. The belief was that only reforming one part of the system would not improve the situations or access to justice for those that were part of the marginalized and poorer sectors of the population. So the National Assembly proposed and passed a series of structural reforms for the judiciary that included consolidation of the courts under the Constitutional Court, providing resources and funds for judicial education, and a reformation of the magistrate court to improve access to the courts. These reforms respectively took place under the Judicial Services Commission Amendment Bill, the Judicial Education Institution Bill, and the Judicial Conducts Tribunal in early 2005 (International Bar Association 2008).

The more problematic legislation came later in the year with the proposal of the 14th Amendment Constitution Bill (2005) and the Superior Courts Bill (2005), while each of these bills were trying to improve the functionality of the court system, they only ended up impeding the independence of the courts (Venter 1998). The court community was very vocal in their protests of these proposals. They claimed that if these were enacted, then it would cause irreparable harm to the country's democratic foundations. The first, the Constitutional Amendment Bill, was a direct modification of the Constitutional section outlining and guaranteeing the judiciary independence (International Bar Association 2009). If the measure were approved it would remove a large portion of the administrative and budgetary controls that the Office of the Chief Justice (OCJ), and reallocate them to a Cabinet member (International Bar Association 2008). The court would no longer be able to independently handle its own budgetary allocations, it would now have to rely on the whims of the Cabinet member that had been appointed. This creates a point of leverage that an individual (specifically a government entity) could use over the court, if he or she was trying to achieve a certain outcome. Constitutional requirements stipulated that to avoid issues with the separation of powers that the Court, in budgetary instances, should only be accountable to the Legislature not the Executive as this Bill was attempting to do.[3]

[3] Similar arguments have been made when establishing democratic separation of powers systems. Most familiar are the cases of Australia, the United Kingdom, Canada, and the United States. Looking within the African continent, Ghana's constitution provides one of the strictest frameworks establishing separation of powers

The Superior Courts Bill (2005) was a combined effort by the executive and the legislature in the wake of the 14th Amendment Constitution Bill to further de-legitimize the South African Constitutional Court. It proposed the changes that the 14th Amendment Constitution Bill had concerning budget allocation and appointments, but then added new stipulations about rule-making for the courts. The 14th Amendment Constitution Bill had not failed to pass, but The 14th Amendment Constitution Bill had not failed to pass, but was still pending before the National Assembly. The Superior Courts Bill provided the executive an additional attempt to reform the Judiciary.

The new stipulations placed in the Superior Courts Bill allowed for the Minister of Justice, a member of the President's Cabinet to now make rules that were to regulate the behaviors and practices of various levels of the Court. Previously, this had been left solely in the hands of the Judicial Rules Board, which similar to the JSC, was composed of various representatives from sectors of the judicial field to ensure balance and equality in the procedures of the Court. However, this proposed change would allow the Minister of Justice to bypass the board, and make whatever rules he wished for the governing of all the superior level courts. Therefore gutting any rule-making capacity the Judicial Rules Board, and the judicial branch by extension had.

between the judiciary and other branches. Article 127 specifically outlines how these structures are going to help support institutional autonomy and judicial independence (1992).

These pieces of legislation were both originally proposed in December of 2005, but after problems on the floor of the National Assembly they were withdrawn by order of President Mbeki in November of 2006. Yet this did not end the threat to the Judiciary, and at the National Conference of the ANC in Polokwane the issue was brought to head again. That December of 2007 with President Mbeki at its head, the ANC passed a resolution titled "Transformation of the Judiciary". The resolution called upon the members of the National Assembly and the incumbent government to pass the Superior Courts Bill and the 14th Amendment Constitution Bill in their full capacity. President Mbeki continued to press the issue as he called again for the National Assembly to pass the legislation in his State of the Union address given in February of 2008. He stated that if the bills were passed by the end of the year that the country could look forward to a new revolutionized criminal justice system (International Bar Association 2008). While this would be one of President Mbeki's last acts in office, it would not be the last actions to infringe upon the judiciary's independence.

The Rise of Jacob Zuma

To understand the next phase of the onslaught on the South African Judiciary's independence, I need to explain the rise of Jacob Zuma through the African National Council (ANC) party. Zuma is currently serving his second term as the President of South Africa after succeeding interim President Kgalema Motlanthe in 2009 (Hamill, South Africa's Continuing Leadership Problems: Will the Real Jacob Zuma Please Stand Up?

2010). Jacob Zuma's rise to the spotlight began when he was imprisoned alongside Nelson Mandela on Robben Island by the former South African Apartheid government. He served a 10 year sentence in the prison work camp for his work with the underground anti-government movement (Gordin 2008). At this point, the ANC was nothing more than a guerilla anti-government organization. After he secured his release, he rose quickly through the more established power structure that the ANC had created in his absence. He spent his time in exile from South Africa in Swaziland, Mozambique, and Zambia through most of the 1980's (Gordin 2008). Predominately he worked with the ANC in Mozambique till he was again exiled in 1987 (Thompson 2001).

Following the end of the ban on the ANC in South Africa in 1990, he returned to begin his ascent to national leadership. He rose alongside future President Thabo Mbeki, who would be responsible for the future attempts at legislative reform of the judiciary during his terms in office (1999-2008) (Hamill, South Africa's Continuing Leadership Problems: Will the Real Jacob Zuma Please Stand Up? 2010). Zuma was elected the National Chairperson of the ANC in 1994 and then again in 1996. He was elevated to Deputy President of the ANC in 1997. He assumed the full roles and responsibilities of President Mbeki's successor in 1999, when he became the Deputy President of South Africa (Gordin 2008). This climb to power would take a significant detour in 2005, President Mbeki had Zuma removed from office for allegations of corruption and fraud (Gordin 2008). He had been linked through his financial and former military advisors to

shady arms deals during his initial return to South Africa in the early 1990's (International Bar Association 2008). Even, with this setback he continued to persevere. The establishment of the ANC was slowly growing disenchanted with the lack of success on the part of President Mbeki. Despite his removal from office and the pending legal troubles, Zuma was still the heir apparent and party favorite to succeed Mbeki should he continue to spiral in favor.

In December of 2007, despite having just been officially indicted by the National Prosecuting Authority for charges of rape, racketeering, money laundering, fraud, and corruption Zuma soundly defeated Mbeki, as the incumbent, to become the President of the ANC and the party's nominee for the national elections (Hamill 2010). Mbeki was seeking his third term for president, but found that both his party loyalists in the ANC and public opinion had turned against him. The party loyalists that had once stood by his side were few and far between, and his outright denial of the existence of HIV/AIDS and its proliferation in South Africa sealed his fate in the eyes of public opinion (Sheckels 2004). The African National Council of Polokwane had spoken, and soon so would the South African people. Mbeki stepped down from office in 2008, and an interim president was appointed until the elections were held the following May. On May 6th, 2009 the ANC won the election, and three days later Zuma was sworn in as the new President of South Africa (Gordin 2008).

Counter-Revolutionaries and Threats to the Judiciary

Zuma's presidency would come with no less threats to the expansion of judicial power then what they had experienced under President Mbeki's attempts at legislative action. Beginning with Zuma's indictment, the South African Judiciary has received an executive onslaught of criticism for their actions under the new Zuma government. The Chief Justice of South Africa, Mogoeng Mogoeng has admitted in interviews that since Zuma rose to power in 2009, he and the Constitutional Court have been victims of numerous attacks on their reputations and their persons[4]. Appointed in 2011 as Chief Justice, he has been nicknamed, "the puppet who tore off his strings", for his complete reversal as an avid Zuma lackey (Plaut 2015). President Zuma's criminal charges have yet to reach any verdict and since its initiation in 2009 has been winding its way through a judicial review challenge in high courts. In 2012, Zuma threatened the courts by stating that there was a need to review the powers of the Constitutional Court, since it seemed that they had begun to interpret the laws in a certain specific direction. This plan was further reinforced through statements issued by the Secretary "General of the ANC, Gwede Mantashe, who claimed that the judges on the court were all counter-

[4] These attacks include firebombing his house, hijacking his official state vehicle, accusing him of rape, sodomy, and prostitution, and accusations of being a spy for the CIA. This was all reported in an extensive interview with the Mail & Guardian in June of 2015 (available at http/://mg.co.za/article/2015-06-11-chief-justice-speaks-out-about-sex-smear)

revolutionaries" out to harm the intentions that the ANC had for the country with their judgements (Calland 2015).

Zuma's contempt for the judiciary was really enforced when he refused to arrest President Omar al-Bashir when he visited for an African Union Summit. Bashir, the president of Sudan, was to be arrested for war crimes upon entering South Africa since they were a signatory of the International Criminal Court. Instead upon his arrival in South Africa, he was taken to a different military base, Waterkloof, and escorted out of the country by ANC forces. A ruling was issued later by the African National Council stating that the court order and subsequent arrest of the fellow head of state would have been akin to a "declaration of war" (Plaut 2015). This and all of the prior actions by the ANC and the executive officers of South Africa have left little recourse left for the judiciary and judicial independence to exist in the failing democracy that is South Africa. Jacob Zuma and his fellow supporters have flagrantly stated that if a decision were to ever come of his trial or of any of the charges, they would simply be dismissed for the lack of veracity in the claims against him. This trend of undermining the rule of law and disregarding the role of the Court can only spell disaster for what was once such a beacon of hope for democracy in Africa.

The key takeaway in this instance is how repeatedly the court has tried to flex its constitutional muscle but has faced severe opposition through democratic institutions such as legislatures and the executive. In each instance where the courts attempt to

provide an alternative form of public policy or law, they are challenged in the public domain by the democratic forces and are stripped of their powers in a sequential manner. Next we present the case of Pakistan where the opposite trajectory takes place i.e. the court picks up powers in a sequential manner and internalizes those powers to become an alternative source of public policy and law.

The Judiciary in Pakistan

Transitions in Power and Setting the Ground-Work

The government and political system in Pakistan in the modern era has remained in a state of perpetual transition. Repeated coups and attempts at democracy have left the political institutions systematically gutted and too weak to present any type of challenge to changing authority. The most powerful state entity continues to be the Military, who continues to reap the benefits of a relatively powerful and organized authoritarian rule. Within all of this mix, the courts have remained in existence, but constantly subservient in power to either democratic or authoritarian regime. The courts, in either case, have been used to provide legitimacy and legal cover for the regime(s) when they had to issue unpopular decisions (Moustafa 2007).

The constant transitioning government entities have continued to chip away at the constitutionally guaranteed independence of the Court. For instance, General

Muhammad Zia utilized the courts to target his political opponent Prime Minister Ali Bhutto, shortly after his overthrow in 1977. He targeted Bhutto for the supposed assassination of a fellow political opponent, had the Supreme Court try, and eventually execute him a short time later (Dossani 2005). This was not an isolated situation for the authoritarian regimes. Unlike in other cases, like Argentina or Chile, the return of democracy did not precipitate a strengthening of the courts.

In 1988, Benazir Bhutto, the former Prime Minister's eldest daughter took power as the first female head of state in an Islamic country. Her party's domination of Pakistan saw the judiciary undergo a series of heavy reforms and restrictions (Dossani 2005). A combination of her party's strict ideology and some lingering resentment from her father's public conviction and execution were attributed to these strict reforms. After a short exit from office in 1990, during another transition government[5], Bhutto reformed her opinions on the judiciary to a certain extent. Upon return to power in 1993, she staffed the office of the presidency heavily with loyalists, who in turn appointed judges that were either sympathetic or neutral to her party's politics. Again, party politics got the best of her, and her government was overthrown in a landslide election in 1997.

[5] Benazir Bhutto was overthrown by a presidential order in 1990 after charges of corruption, nepotism, and despotism were laid against her. While the stories of her corruption were unconfirmed, the circulation of them drove her into disfavor and she conceded the election of 1990. The winner of those elections was Nawaz Sharif, a protégé of General Zia, and he attempted to drive the courts into similar state of submission.

Nawaz Sharif returned to his former position, and handpicked the entire Supreme Court. He regained control of all of the political organs of the country just in time to be overthrown in a military coup in 1999 (Dossani 2005). The new dictator, General Musharraf suspended the constitution therefore eliminating the independent authority of the Supreme Court and all other government institutions. In an effort to regain the power of the judiciary, he introduced the Provincial Constitutional Order (PCO) as a presidential amendment. It effectively provided a mechanism for his regime to test the loyalty of the judges set in place from the former regime. Most of the senior judges resigned their positions refusing to take the loyalty oath to the new regime, leaving new spaces for Musharraf to appoint "loyal" judges and create a completely responsive court (Notes 2010).

Moving Towards Independence

For the next six years, the judiciary of Pakistan functioned as an arm of General Musharraf's regime. For the most part it handled the day to day "red tape" bureaucratic decisions that the government did not want to take time or take credit for. For the most part, the courts were responsible for issuing unpopular decisions to help to foster the repressive regimes "new" agenda. The status quo changed when in 2005 the new Chief Justice of the Supreme Court was sworn into office. The new Chief Justice, unlike his predecessors was less of a puppet of the regime, and began to see new ways through which the role of the judiciary could be expanded. Chief Justice, Iftikhar Chaudry, saw

that the court was more than an extension of the dictator and began taking steps to transform it into an effective and independent institution. During this time the dictatorship was undergoing changes as well as the economic growth was slowing down.

Chief Justice Chaudry began to take up public interest and human rights litigation that had long been ignored by the Courts. Unlike his predecessors, he welcomed the media attention that the cases brought, and encouraged opposition to the regime. Utilizing his *Suo Moto*[6] powers to take up cases of individuals that were being ignored or being prosecuted unfairly by the government (Ghias 2010). Some of the issues that were brought before the Court included illegal detention cases[7], the sale of state owned enterprises[8], and illegal urban planning or price gouging[9]. The unfettered access to the Courts by the media, and the steady stream of stories soon began to change the tide of public opinion in the courts favor. Prior to this the Courts had only been an arm of the regime, but now their independent image was beginning to gain traction. As the courts became an alternative story to the generals, the profile of the courts as a parallel law making and public policy institution began to set in. Even though most of it was perception, it did help consolidate the power of the court.

[6] Powers that allowed the Chief Justice to bring cases before the Court despite jurisdiction or issues of standing that may prevent them from getting to the highest levels of the Court. These powers were used exclusively to bring public interest litigation.

[7] *Suo Motu* Notice on report of Human Rights Commission of Pakistan alleging the State of Pakistan had illegally abducted and confined 41 Baloch separatists

[8] Supreme Court Case - *Watan Party v. Federation of Pakistan (*2006)

[9] Supreme Court Case - *Moulvi Iqbal Haider v. Capital Development Authority (*2006)

In 2006, the trajectory of the court was sealed when the Court took a stance against the Pakistani government in the case *Watan Party v. Federation of Pakistan* (2006). The government attempted to sell off the Pakistani Steel Mills, a burgeoning public enterprise that would have resulted in a loss of thousands of jobs across the country. Instead Chief Justice Chaudry, at the helm of the Court, stepped in and saved the mills thereby embarrassing the government. This and a continuing series of *suo moto* actions won the judiciary the heart and support of the people especially in a country with a relatively new private media with a 24 hour news cycle (Ghias 2010).

Meanwhile the Chief Justice was actively surrounding himself with a legal network that would provide support and means to work together and provide structure around the court. He worked with the bar associations and professional lawyer forums, bygones of the old colonial British system, to re-establish a network of contacts. He began to lecture and provide feedback in various legal forums as well as appoint more justices to the lower levels of the Court to ease the strain that existed on the legal system.

These relationships with senior lawyers, judges, and members of the community began to pay off as tension began to ratchet from the *suo moto* decisions. His and the other justices investment in the system showed the legal community that they were willing to take a stance for both the ordinary citizen and the legal community. With a private media and no alternative sources of opposition to the regime, the courts could disassociate themselves from the regime and harness their own influence.

While the Chief Justice was building a new public face for the judiciary, he and his fellow justices invested heavily in creating a patronage like system within the legal community i.e. an eco-system where the judges, the lawyers, and community leaders, and members could unite under common goals. In many ways, it was as if the Courts were pre-empting the backlash that they knew would come from the series of losses that the government had faced under their new bold initiatives.

Finally, General Musharraf and his government promptly suspended the Chief Justice from his position alleging that he was corrupt and had thoroughly abused his authority. The case of the suspension was sent to the Supreme Judicial Council, and after several months of deliberations the Chief Justice was reinstated in July of 2007 (Ghias 2010; Notes 2010). Many believed this was a result of the Chief Justice's adamant moves to restructure the Supreme Court and its surrounding entities. The Chief Justice resumed his office, and continued to push his adversarial legal agenda against the institution of the state. The attention from the media was furthered even more so as he continued to take the government head on in cases instead of being more pragmatic. On November 3, 2007 General Musharraf declared a state of emergency and suspended all the powers of the Chief Justice and the judiciary (International Bar Association 2010). The Chief Justice was immediately removed from office and placed under house arrest for his alleged "crimes against the state" (Ghias 2010). In essence then, the judiciary turned the institution in to an independent autonomous unit that legitimately opposed the

dictatorship in a time when there was no other opposition. Empowered by the constitution and consolidated through the media machine and public opinion, the Chief Justice successfully revamped the institution.

As soon as the court was suspended, he legal community launched into action to protest this violation. The Bar Associations and Councils led the charge of strikes and protests to help the man that created the legal community that served them so well. The involvement of the community, the media, and the professional bar councils provided the critical mass that was able to keep the civil society movement going. This resilience and effort to protect their own stakes and people, culminated in the resignation of General Musharraf in the beginning of 2008 to avoid impeachment (Notes 2010). In the newly established democratic government, the lawyers and legal movement still retained their independence and strength, while threatening to bring down the new government if the judges were not restored. The government, fearing popular protests, reinstated the judges after eighteen months of suspension in March of 2009 (International Bar Association 2010). The lawyer's movement and the Chief Justice's perseverance shows that the courts could not be intimidated or pressured once the concept of rule of law was attempted. Another critical point to note is that once the public was convinced that the courts could be a legitimate opposition to a government in power, their support for the institution sustained. The legal community and its subsequent behavior in order to survive became synonymous with the idea of an independent judiciary. The Chief Justice

designed a system from the time of his appointment in 2005 that was as stable and equally as powerful as any judiciary established in a democracy.

The case of Pakistan helps the argument we set out at the start of this paper i.e. that *in times of governance transitions, the public has higher confidence in the judiciary if it manages to disassociate itself from the regime through judicial activism and institutionalization*. Even under authoritarian rule, the state institutions have the leverage by the virtue of bureaucratic efficiency to potentially break away from the regime and oppose them through legal means. While this is true for common law systems only, it does present an alternative narrative to the idea that judicial independence is quintessentially a democratic norm.

Conclusion

This paper set out to address the role of judicial independence and what the trajectory establishing independence will take within a country. Trajectories of judicial independence never seem to map as clearly or precisely as the literature would like to claim despite the regime type that is being studied (Iaryczower, Spiller, and Tommasi 2002; Larkin 1996; Fiss 1993; Gloppen and Kanyongolo 2006). They all seem to head to one of three directions, bureaucratic efficiency, democratization, or judicial independence. Looking beyond this, we argue that the Courts have moved past

bureaucratic efficiency to judicial independence, despite the fact that they are operating in a democracy or an authoritarian regime.

The argument set forth in this paper is counter intuitive to most of the literature out there. We are not arguing the mechanics of judicial independence neither are we negating its role in democracies. What this paper is putting forward is an alternative narrative to how judicial independence is not just a function of a democracy but a critical element in authoritarian and transitionary regimes. The judiciary has more scope in transitionary regimes to become an alternative source of law making and public policy if it chooses to utilize autonomy not just in its decision but in its operations as an institution. This scope is greatly reduced in times of democracy, as the legislature and executive are elected by the masses and any opposition to them can be construed as opposing public choice. Our theory presents a trajectory that is observable in countries that have gone through transitions and employ British common law system but it can be applied to other cases that do not necessarily meet both these requirements. Judiciary in cases like Chile and Argentina during their time of transitions also took similar trajectories even though they both lacked the common law systems.

Through the cases of South Africa and Pakistan we have presented two diverse trajectories under different governance models using the same legal structure. While the case of South Africa is more recent, the case of Pakistan presented here was the time period of transition. More recently under democracy, Pakistan has also gone the route of

South Africa. The legislature and executive has slowly amended the constitutions and chipped away at the legal leverage of the courts to clamp down on autonomous and independent nature of the institution. The Bar Councils and Associations have returned to being run along on the lines of party politics while former judges have joined active politics too. This systematic *rebureaucrtization* of the courts is only observed in democracies. Hence, our argument that achieving judicial independence and retaining it is not a quintessential democratic norm but in fact it is a unique transitionary period phenomenon that erodes quickly under a democracy stands based on our case analysis.

Our paper also sets up future research on the subject of judicial independence in semi democratic and competitive authoritarian regimes. Future research can focus on how the British common law system gives alternative policy making space to judiciary under any regime type. There is also potential for research in understanding how individual justices can influence the judiciary's institutional approach from working as part of the government to competing against it for public approval. Authoritarian regimes often use the courts initially to do away with political competitors but by doing so they cede policy and law making space and yet most authoritarian regimes still employs this approach. Future research can also address what alternative mechanisms might the authoritarian or semi democratic regimes employ in order to avoid a confrontation with the courts.

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